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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHIEF JUDGE RICHARD SEEBORG

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
VS.)	No. CR 17-cr-180-RS
)	
APRIL DIANE MYRES,)	
)	
Defendant.)	San Francisco, California
_____)	

Tuesday, October 4, 2022

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff: STEPHANIE M. HINDS
United States Attorney
450 Golden Gate Avenue, 11th Floor
San Francisco, California 94102
BY: LAURA VARTAIN
NICHOLAS WALSH
ASSISTANT UNITED STATES ATTORNEYS

For Defendant: KING & SPALDING LLP
50 California Street
Suite 3300
San Francisco, California 94105
BY: MICHAEL J. SHEPARD, ESQ.

KING & SPALDING LLP
633 W. Fifth Street
Suite 1600
Los Angeles, California 90071
BY: JAMIE A. LANG, ESQ.

Reported By: **BELLE BALL, CSR 8785, CRR, RDR**
Official Reporter, U.S. District Court

Tuesday - October 4, 2022

9:56 a.m.

P R O C E E D I N G S

THE COURTROOM DEPUTY: Calling Case 17-CR-180, United States versus April Diane Myres. Counsel, please state your appearances.

MS. VERTAIN: Good morning, Your Honor. Laura Vartain and Nicholas Walsh for the United States.

THE COURT: Good morning.

MR. SHEPARD: Good morning, Your Honor. Michael Shepard and Jamie Lang on behalf of the defendant, April Myres, who is present in court and out of custody.

THE COURT: Good morning. This is the time set for resentencing after remand by the Ninth Circuit. Specifically, the Court's memorandum of February 16th of this year in which the Circuit Panel affirmed Ms. Myres's conviction but remanded to discern -- and was in the memo -- Ms. Myres' intent with respect to the amount of intended loss.

Obviously, I am quite familiar with the case and have reviewed the record. I've reviewed the revised presentence reports, the recently submitted sentencing memos submitted by the parties, including a letter in support of Ms. Myres by an elder in her church. And of course, I've reviewed the Ninth Circuit memorandum.

As to the revised presentence report, are there any objections to the factual material presented, beyond what was

1 previously discussed?

2 **MS. VERTAIN:** Not from the government, Your Honor.

3 **MR. SHEPARD:** If, if by reference to "what was
4 previously discussed" you mean the objections we have
5 previously raised with the Court and the Court ruled on, --

6 **THE COURT:** Right.

7 **MR. SHEPARD:** -- no, as to the facts.

8 **THE COURT:** Okay. I reviewed the objections that are
9 listed for each side in the revised presentence report. I've
10 considered those. I'm going to overrule the objections each
11 side had presented.

12 Have the parties had an opportunities to review the
13 presentence report?

14 **MS. VERTAIN:** Yes, Your Honor.

15 **MR. SHEPARD:** Yes, Your Honor.

16 **THE COURT:** And Mr. Shepard, have you had an
17 opportunity to review it with Ms. Myres?

18 **MR. SHEPARD:** Yes.

19 **THE COURT:** The central question for me, it seems,
20 upon resentencing, is the appropriate calculation of loss and
21 the accompanying advisory sentencing guideline enhancement.
22 Previously I imposed a six-level loss enhancement under
23 2B1.1(b)(1)(B) and (D), which was the 40,000 to 95,000 loss.

24 The defense is arguing, as I understand it, that the
25 appropriate enhancement here would be, at most, a two-level

1 loss, which would be 6,500 to 15,000. Is that correct,
2 Mr. Shepard?

3 **MR. SHEPARD:** That is correct, Your Honor.

4 **THE COURT:** All right. Ms. Vartain.

5 **MS. VERTAIN:** Thank you, Your Honor.

6 I think I would propose to go through the -- as the Court
7 knows, the government is recommending that the Court stick with
8 the six-level enhancement, and find that the entire 68,000,
9 approximately, was April Myres' intended to defraud Farmers of
10 that full amount.

11 What I propose to do, Your Honor, is talk about the
12 evidence in three categories. And when I speak of "the
13 evidence," I essentially mean what April Myres listed on her
14 proof of loss.

15 In the first category are the items that the Sheriff's
16 Department owned and had given back to -- had replaced for
17 April Myres, as well as the three items that when the FBI
18 searched her home in 2017, they found in her home, and that.
19 Of course. Myres had already claimed to Farmers had been
20 stolen.

21 **THE COURT:** And that comes up to about a 9,000,
22 roughly, loss?

23 **MS. VERTAIN:** That's correct, Your Honor.

24 **THE COURT:** All right.

25 **MS. VERTAIN:** Let me just continue walking through the

1 buckets, and then I will go --

2 **THE COURT:** Of course.

3 **MS. VERTAIN:** -- back to them in order.

4 The second bucket, Your Honor, are those categories of
5 items that April Myres listed on her proof of loss, and are in
6 the wind, as it were. The government did not find them at any
7 point in time and cannot show them to the Court, could not show
8 them to the jury, because we do not have them.

9 And then sort of as a subcategory of that, there is the
10 third category of items, which are those that her co-defendant
11 Antoine Fowler had on his phone. A much smaller category. And
12 of course, also Antoine Fowler had her firearm as well in 2017
13 when the FBI searched him.

14 And what I would like to do, Your Honor, is go through
15 each of those categories and focus on the statements April
16 Myres made with respect to those to Farmers, and use that as
17 the lens by which we assess what -- and what the Court should
18 assess as to what April Myres intended when she made statements
19 to Farmers.

20 Across all of them, Your Honor, what the government is
21 doing and what I believe we urged the Court to do in 2019 when
22 we were at sentencing is to use the statements April Myres
23 made, the untruthful statements she made, as well as the things
24 she did not say to Farmers, as the way by which we assess her
25 intent to defraud Farmers of the full value of the claim.

1 **THE COURT:** Well, it's kind of a moving target, as I
2 read what the government is arguing. The government's saying:
3 We're not taking the position that it's essentially fraud in
4 the inducement because the claim has some untruthful parts of
5 it, so the whole thing is a fraud, and you can then just take
6 the whole thing. Because there's some case law that indicates
7 that I can't do that.

8 But you are suggesting, somehow, that nonetheless, I can
9 consider the false statements in the claim as somehow
10 indicative of her intent with respect to some of these other,
11 as you say, this other two collection -- the buckets, if you
12 will. And I'm not sure I understand that argument.

13 And in addition to that, I think it's pretty clear that
14 this is different than cases where, to acquire the insurance
15 from the get-go, there is an application for the insurance
16 which is fraudulent. And then there is an argument that, you
17 know, you never had coverage to start with, because you lied at
18 the beginning.

19 Your argument is, as I understand it, keyed to the claim
20 and the fact that the claim had some falsehoods in it. But I
21 can't just say that because there's some falsehoods, that means
22 the entire claim establishes her intent.

23 **MS. VERTAIN:** I think, Your Honor, that you can find
24 that her falsehoods were meant to deceive Farmers. At no point
25 did April Myres tell Farmers the truth about the critical

1 facts.

2 **THE COURT:** The problem is, I accepted that argument
3 from the get-go. And the Ninth Circuit says no. I mean, if
4 that was the case, why would the Ninth Circuit have remanded it
5 to me?

6 I mean, I understand the Ninth Circuit didn't say: Remand,
7 with instructions that I consider, you know, these -- this
8 amount as proven or not, and then sentence accordingly.
9 They're giving it back to me to exercise my discretion.

10 But if you're right, I don't know why they would have sent
11 it back at all.

12 **MS. VERTAIN:** I don't think the Court made any clear
13 findings at all. And --

14 **THE COURT:** Well, but I accepted your argument. Your
15 argument then is the same as your argument now, which is, you
16 know, this claim form is -- is riddled with fraud, and -- and
17 one can discern her intent to defraud from that fact, and that
18 even though the government went back and forth on whether or
19 not she was complicit in the robbery, you didn't ultimately ask
20 the jury to convict on that.

21 So, you know, I -- I -- I've read the few sentences the
22 Circuit has provided to me over and over and over again. And I
23 don't quite see how this case could have come back to me, if
24 you're right.

25 **MS. VERTAIN:** I -- I mean, the way I read the

1 Circuit's opinion is that the Court didn't know what -- the
2 Circuit did not know what the Court's findings were on that. I
3 think it was vague that the Court was accepting the
4 government's argument as to the "riddled with fraud."

5 And I certainly think that what we didn't clearly
6 articulate at that time was that by a preponderance of the
7 evidence -- I mean, the jury convicted April Myres of the
8 precise fraud here. And by a preponderance of the evidence, if
9 we use her false statements to assess what she wanted, she
10 wanted to deceive Farmers.

11 And certainly, by the low standard that a preponderance
12 is, there is no evidence that there was a -- that she was the
13 victim of a burglary. The opposite is true, Your Honor. The
14 evidence is that she wanted to throw Farmers off at every turn,
15 as to the circumstances about what happened on March 24th.

16 **THE COURT:** Just as consistent with the interpretation
17 that she wanted to cheat Farmers out of \$9,000. You know. The
18 amount -- the items that were in her home that she claimed.
19 And then the items that were -- belonged to the Sheriff's
20 Department.

21 I mean, your presentation is she wanted -- she lied and
22 cheated Farmers. I think that's true. I think the jury
23 convicted on that. But why is it then so clear, by a
24 preponderance, to you that she lied and cheated to the
25 magnitude of \$68,000? Because the government didn't proceed on

1 the theory -- I know you kind of danced around it, and to this
2 day, will suggest that there was complicity in that. But
3 that's not what was proven to the jury, and I don't think even
4 by a preponderance you've proven that.

5 **MS. VERTAIN:** But as to what she claimed on her form,
6 why can't we -- and I think we should take the fact that she
7 wasn't truthful about some portion of it, and say that lends
8 itself to the inference -- and certainly, a preponderance could
9 be met by this -- that she intended some greater portion of it?

10 It seems far-fetched to believe, given the number of lies
11 that she made, that there was, in fact, truth at all in this
12 claim. I don't think that evidence was presented or -- to the
13 jury. And so I think we're sort of giving her a huge benefit
14 of the doubt that somehow she wasn't trying to deceive Farmers
15 as to a larger portion than the 9,500.

16 **THE COURT:** Well, I think you have correctly
17 identified the question, which is whether or not an inference
18 from what she submitted is sufficient to create a -- to satisfy
19 your burden, preponderance burden, that the whole 68,000 she
20 intended to defraud.

21 And that's the question. I mean, is that enough? Or is
22 that not enough? And that's what I have to wrestle with.

23 Go ahead.

24 **MS. VERTAIN:** Oh. I think in wrestling with that,
25 Your Honor -- and I'm not going to belabor this point because I

1 know that the Court knows this. But if we were to walk
2 through, as the jury heard and is outlined in our papers, the
3 number of times that she lied to Farmers about the critical
4 facts as to who was at her house and who wasn't at her house,
5 that shows that she knew far more than the normal victim of a
6 burglary who has no idea who's done it would. And so on that
7 level, truly, this was a claim riddled with fraud meant to
8 deceive Farmers from asking further questions.

9 And the Court might recall that -- this was a long time
10 ago, but at the jury trial, Farmers was asked repetitively by
11 the prosecutors: Did you rely on April Myres's statements to
12 you? And at every time that Farmers representatives were asked
13 that, they said yes.

14 There's a reason Farmers asked all these questions both in
15 the claims form, in the interview and in the sworn statement,
16 because they were trying to assess the truth. And we know what
17 Farmers did when they found out the truth. They denied the
18 claim.

19 And I think that that's indicative of the fact that --

20 **THE COURT:** Of course, there's evidence of a contrary
21 version of events. And, as I understood the defense argument
22 was, that this was effectively a revenge burglary because we
23 knew about the relationship between Fowler and Myres. And so
24 their version was: Well, he was taking it out on her,
25 effectively.

1 And there was some evidence they could point to to
2 support -- there was no -- she didn't end up with any of the
3 funds from Fowler trying to fence these items. There wasn't
4 any indication that there was ongoing connection of any kind.
5 Apparently there'd been a breakup; there'd been contention
6 between Fowler and her family. I mean, so there -- it's not as
7 if there's no evidence of a contrary version of events out
8 there.

9 Now, I understand, you don't buy those, but, I mean, it's
10 not as if all we have in this case was your inference, and
11 nothing else.

12 **MS. VERTAIN:** Yes, Your Honor. Although, if I can
13 address the items on Fowler's phone and the notion that somehow
14 she was innocent of that, I mean, as the Court knows, Farmers
15 has asked her, under oath: Do you have a disgruntled
16 ex-boyfriend? And she said no. That's plainly false and meant
17 to throw Farmers, to deceive Farmers into paying her claim.

18 Now, we also know --

19 **THE COURT:** Well, you don't think they were
20 disgruntled. Do you? If you're saying she was complicit in
21 the robbery, they're not disgruntled.

22 **MS. VERTAIN:** The disgruntled ex-boyfriend?

23 **THE COURT:** Yeah.

24 **MS. VERTAIN:** We saw him throwing trash cans on her --
25 on --

1 **THE COURT:** Okay, so how is she complicit in the
2 robbery?

3 **MS. VERTAIN:** Oh. As to the complicity in the
4 robbery, I'm just talking about the falsity of the answer: "No,
5 I have no disgruntled ex-boyfriend."

6 Now, the Court will recall that this investigation started
7 with the reporting by the charged defendant -- a defendant that
8 my office charged reporting that he had a cellmate, who was
9 Antoine Fowler, who was saying that his girlfriend, a Deputy
10 Sheriff, was going to give him her firearm. That turned out to
11 be true, years later, which is indicative of the fact that
12 April Myres knew, certainly, to expect that Fowler had her
13 firearm, if not that she'd given it to him.

14 And so I think the Court is taking a huge leap of faith to
15 accept the premise that somehow these were genuine losses. I
16 don't think there's any evidence of that. And I think the
17 Court can and should take her number of lies throughout the
18 process as indicative of the fact that she intended to cheat
19 Farmers out of the full claim.

20 **THE COURT:** Let me shift your focus for a moment. And
21 that's -- you know, it's not lost on any of us that a lot of
22 time has transpired since the trial and your appeal and the
23 like, and now we're back here again at the instruction of the
24 Circuit.

25 Should I take into account the fact that Ms. Myres has

1 been out all this time? She's apparently conducted herself
2 well on -- under the release conditions that she has. She has
3 some extenuating circumstances now in the form of issues with
4 respect to healthcare for her brother.

5 I mean, you're saying I should just impose the same
6 sentence again. But do you think it would be wrong for me to
7 take into account some of those factors?

8 **MS. VERTAIN:** I think that the Court has taken those
9 similar factors into consideration. Not with respect to the
10 length of time, but in terms of her good behavior in the
11 duration, that was the same as when the Court sentenced her in
12 2019. Her health issues are not out of the realm of what BOP
13 encounters day-to-day. And I do think it's --

14 **THE COURT:** Well, they're not her health issues,
15 they're the health issues of -- she's the caretaker for
16 someone. And presumably, if she goes into custody, there are
17 some issues as to whether or not she can be the caretaker.

18 **MS. VERTAIN:** I'm sorry; I was addressing her
19 hypertension, Your Honor.

20 **THE COURT:** And I was talking about her brother.

21 **MS. VERTAIN:** And I think those are things the Court
22 can take into consideration. And I think the Court should also
23 take into consideration and weigh heavily the seriousness of
24 the crime which the Court articulated at the time that she was
25 sentenced. And, certainly, the length of the appellate

1 proceedings, the exhaustion of all remedies up to the Supreme
2 Court has allowed her the benefit of more time to prove
3 herself. She has done that. I still think a custodial
4 sentence is warranted, given the egregious nature of her
5 conduct in this case.

6 **THE COURT:** Mr. Shepard.

7 **MR. SHEPARD:** The Court has obviously read very
8 carefully what's been filed, and is familiar with the evidence
9 from the trial, so I won't go through in great detail. I would
10 just like to take a couple of high-level points that I can
11 articulate perhaps a little differently than what I already
12 wrote for the Court.

13 And, and, I guess that would start with two main
14 propositions. One is that I don't think the government is
15 correct when they say that because Ms. Myres was not completely
16 truthful with Farmers, that was part of an intent to defraud
17 Farmers. We illustrated repeatedly that the things the
18 government describes, like no disgruntled ex-boyfriend, that
19 was because if she said that to anybody, the sheriff's
20 department was going to fire her. And she was trying to
21 preserve her job. That was proven at trial. So that was not a
22 lie to defraud Farmers. That was Ms. Myres trying to save her
23 job at the Sheriff's Department. And we laid that out for
24 pretty much all of the lies that the government alleges in our
25 papers. The government has really never responded to that.

1 But that's -- and that, in and of itself, I think, would be
2 sufficient to reject the government's argument.

3 But, even if I was wrong about that, the government's
4 argument is wrong as a matter of law. And that's embedded in
5 the principles, a few principles that we're all trying to
6 discern from the limited things that the Ninth Circuit said.

7 But, but the loss, intended loss is a really esoteric
8 concept in the guidelines, the more I've looked at it. And
9 what -- what the courts have said is that the loss must result
10 from the fraud both as a but-for and as a proximate cause. As
11 the Ninth Circuit said that earlier this year again in the
12 *Lonich* case that we cited.

13 And that means that the Court has to determine to what
14 extent there were legitimate losses embedded in her claim. And
15 those cannot be included in the fraud. And that's what the
16 First Circuit said in the *Alphas* case that we cited in our
17 papers here and in the Court of Appeals.

18 **THE COURT:** Let me stop you for a moment. Ms. Vartain
19 says, okay, but we can make -- it is an appropriate inference
20 from the untruths that were told to Farmers in the claim form,
21 that we all know are not true, that one can infer from that
22 that Ms. Myres did intend to defraud Farmers to the full extent
23 of the claim.

24 And my question is, is that an impermissible inference?
25 Or is it an inference, but just one that you think you have

1 rebutted?

2 **MR. SHEPARD:** Both. It's an inference we have
3 rebutted. It's also an impermissible inference under *Alphas*,
4 which says you have got to look and see whether there were
5 legitimate claims. *Alphas*, to use the phrase from my youth,
6 lied like a rug. Not only did he have all kinds of false
7 claims, he made up documents in support of his false claims, he
8 altered existing documents to support his false claims. He
9 made Ms. Myres look like the most -- the best truth teller on
10 the planet. And the First Circuit still said: Nope, he has
11 some legitimate claims in here there and under this esoteric
12 concept of intended loss in the guidelines, those legitimate
13 claims cannot be included in intended loss.

14 And, and I think that's dispositive of that, of this
15 issue.

16 Another way to look at it is the language in the
17 guidelines, in the comment that explains intended loss, and
18 says -- by the way, this is language that got better for the
19 defense, even after the *Alphas* decision and the *Torlai* decision
20 that the government cites. It got changed at the end of 2015.
21 It says (As read):

22 "Intended loses is pecuniary harm that the
23 defendant purposely sought to inflict."

24 And that language was taken from an opinion that Justice
25 Gorsuch wrote when he was on the Tenth Circuit and he, in that

1 case expressly rejected the notion, that's *United States versus*
2 *Manatau*, he expressly rejected the notion that intended loss
3 can be satisfied by a loss that the defendant merely knew would
4 result from the scheme, or a loss that the defendant might
5 possibly and potentially have contemplated, and instead,
6 established that intended loss is a loss purposely sought to
7 inflict.

8 And how can someone purposely seek to inflict a loss on
9 the insurer when the items -- at least some of them -- that
10 they're claiming were actually stolen? It just -- you cannot
11 connect those two.

12 So there are several different ways in which the
13 government is wrong. They are wrong factually; they are wrong
14 because they don't meet the causation requirement that the
15 Ninth Circuit spelled out in *Lonich*, and the First Circuit
16 applied to a very similar case in *Alphas*, and they're wrong
17 because they don't meet the definition of intended loss under
18 the guidelines.

19 **THE COURT:** Am I correct that you are drawing a
20 distinction on those cases that the government points to -- is
21 it right that you think the distinction in those cases is that
22 -- that -- I'm not sure all of them, but that the bulk of those
23 cases are cases in which the question is whether or not there
24 was insurance coverage at all?

25 **MR. SHEPARD:** Yeah --

1 **THE COURT:** Because of falsehoods in the application
2 process for coverage?

3 **MR. SHEPARD:** It's a little more than that but,
4 essentially right. *Torlai*, the leading of the cases the
5 government cites, *Torlai* did not have a legitimate claim at
6 all. None.

7 **THE COURT:** Because of the fraud in the request for
8 insurance coverage?

9 **MR. SHEPARD:** Because none of what he was claiming was
10 actually covered by his policy if he had been truthful. And
11 here, if Ms. Myres had been truthful, she did have items that
12 she was claiming that were covered by the policy. And that's
13 the difference between -- and *Alphas* made that exact
14 distinction. And that's why *Alphas* is what governs here, and
15 not the cases the government cites.

16 **THE COURT:** Okay.

17 **MS. VERTAIN:** Your Honor, if I could just --

18 **THE COURT:** Yes, go ahead.

19 **MS. VERTAIN:** -- be heard on two points. The first is
20 I would like to talk about *Alphas* for a minute. But I'm not
21 asking the Court and the Court should not rely on the void for
22 fraud clause as the -- as indicative, and therefore bypassing
23 Myres' intent. I don't think that's what the Court did before.
24 And yet, there would have been -- had Myres been truthful, none
25 of her claim was valid. Because she did have people living

1 with her -- she had Fowler living with her, a convicted felon,
2 on the eve of the burglary. And clearly, Farmers is trying to
3 assess all of the circumstances to figure out if she fits into
4 their policy coverage. And had she been truthful, in fact, she
5 would not have.

6 Now, Mr. Shepard relies heavily on *Alphas*. And to the
7 extent it's helpful, I think what *Alphas* is clear about is in a
8 case like this where there is a claim that is rife with fraud,
9 as *Alphas* says, the burden of production can shift to the
10 defendant to prove what was legitimate. And I think here,
11 that's appropriate, because there's a real question as to what
12 is legitimate.

13 You know, the Court -- the government's view is that none
14 of it is. But Mr. Shepard could try to show that some portion
15 of it is legitimate, and then the Court could figure out what
16 dollar value to assign to the loss enhancement.

17 **THE COURT:** Well, that then gets back to where we
18 started.

19 What is the proof you would point me to, other than the
20 inference that we've talked about, that anything over the 9,000
21 or so dollars with respect to the items she -- were found in
22 her house and the -- and the items that the sheriff's
23 department owned, the rest of it, what is your evidence that
24 she intended to defraud with respect to that additional
25 property?

1 **MS. VERTAIN:** There -- there is none other than her
2 own statements, which is generally how we assess a fraudster's
3 intent. Whether they tell the truth, whether they lie --

4 **THE COURT:** And what was the lie?

5 **MS. VERTAIN:** No disgruntled ex-boyfriend, no suspect.
6 "No one at my house when I left it." The video recording that
7 the jury watched showed that to be patently false. She left
8 people in her house. And she knew they were there, because
9 they were there when she was there.

10 **THE COURT:** Right. What do I do with Mr. Shepard's
11 rejoinder, which is the explanation for that -- not a laudable
12 explanation, but the explanation is she was lying for a
13 different purpose?

14 **MS. VERTAIN:** She can have a mixed motive, Your Honor.
15 But she made the lie to Farmers, under oath. And so one
16 purpose, it would seem, based on the facts of it, was to
17 confuse and defraud Farmers.

18 **THE COURT:** Well, but isn't what I have to find was
19 that the lie was -- it's the intended loss. It's that she
20 intended to get the money from Farmers, in addition to the
21 \$9,000.

22 **MS. VERTAIN:** Yes.

23 **THE COURT:** Right?

24 **MS. VERTAIN:** Yes. Because she didn't want Farmers to
25 find out the truth about what happened that day.

1 **THE COURT:** Okay. Okay. Anything more, Mr. Shepard?

2 **MR. SHEPARD:** Um, I don't think that answers *Alphas*.

3 And in addition, just to the -- again, we've addressed this at
4 some length. As to who was at the house, she did talk about
5 other people who were at the house. She was not accurate.
6 Whether that was intentional or not, I don't know. Was not
7 accurate about who was at the house when she left.

8 She did talk about other people who were at the house that
9 day. And we know that those people didn't commit the burglary.
10 They left empty-handed that's on the video across the street.
11 We know where the loot ended up, it was with Fowler and not
12 with people who were in her house.

13 So it's just a diversion. It doesn't address the
14 causation requirement. It's not a proximate or but-for cause
15 of anything. So --

16 **THE COURT:** The other lie the government points to is
17 the video system. And whether or not it was the -- whatever we
18 call it, was -- that was another one that they point to.

19 **MR. SHEPARD:** Right. But that was not false. And we
20 laid that out --

21 **THE COURT:** Well --

22 **MR. SHEPARD:** -- in the briefing. They tried to make
23 it sound false, if you remember, by calling -- there were two
24 officers who interviewed Ms. Myres about that. They called the
25 one who didn't write the report to describe what Myres said.

1 But the -- what the writer of the report said was what actually
2 happened, which was nothing was triggered on the video. That's
3 what Ms. Myres said. And that's what the officer who wrote the
4 report noted in his report, as opposed to the one who came
5 three years later and said something a little different. So
6 that one just wasn't a lie. Not proven as a lie.

7 And as the Court knows, we think the proof would have to
8 be clear and convincing on these things. But I don't think
9 they prove it under -- under any standard at all.

10 And if the Court would like, I can address the question
11 about, you know, was there a burglary, and who's got the burden
12 of production. As we noted, the government first tried to put
13 the burden of proof on us. In fact, *Alphas* suggested at most
14 we would have a burden of production.

15 And I would suggest we certainly met that by showing the
16 information that the government took from Mr. Fowler's home,
17 but did not produce to the jury, which was that he had a bunch
18 of the loot and that he was selling it without her. And that
19 certainly meets our burden of production, that there was a
20 burglary and a bunch of the items were lost. That puts the
21 burden of proof back on the government. And as the Court has
22 noted, they haven't proven anything about that at all.

23 **THE COURT:** Okay. Ms. Myres, as the last time, this
24 is your sentencing. You have a right to speak directly to me.
25 You are not required to do so. It's up to you. But if there

1 is anything that you want to say, now would be the time to say
2 it.

3 **MR. SHEPARD:** I have discussed that with her, if I
4 may. And she would respectfully stand on what she said to the
5 Court at the first sentencing, which I could remind the Court
6 of if --

7 **THE COURT:** Go ahead, remind me.

8 **MR. SHEPARD:** -- if desired. This is what she said.
9 She said (As read):

10 "Honorable Judge Seeborg, there are no words
11 to express my sorrow and shame. The
12 disastrous result of my bad associations and
13 choices have greatly impacted my family,
14 friends, fellow deputies. And for this I am
15 truly sorry. As a child, and throughout my
16 adolescence, my mother would often recite
17 Corinthians 5:33 which says 'Do not be
18 misled, bad associations spoil useful
19 habits.' Unfortunately, I disregarded this
20 sound counsel as an adult. And now faced
21 with life-long consequences, I have no one to
22 blame but myself. I allowed my treacherous
23 heart to justify a wrong course."

24 I didn't have anything to do with writing that. It was
25 much nicer than I would have written. And she asks if she

1 could just stand on that at this point.

2 **THE COURT:** Very well.

3 **MR. SHEPARD:** I did have some things I was going to
4 say in further mitigation, leaving the guidelines aside. I
5 don't know if the Court wants to hear more from me or not,
6 but --

7 **THE COURT:** No, go ahead.

8 **MR. SHEPARD:** And I certainly won't belabor this.
9 But, you know, we have been talking at great length at this
10 point about the guideline calculation. But of course, as the
11 Court knows, the sentencing is not just about the guideline
12 calculation. And these resentencings always inherently call
13 for a fresh look. As the Court noted in its initial question
14 to the government, that includes post-conviction conduct.

15 So, just to highlight, as the Court has already noted,
16 what has happened since the trial. She's had no hiccups of any
17 kind on supervised release for five and a half years now.
18 Performs large amounts of community service through her church.
19 She helps friends in need. She created a plan to keep the
20 church secure.

21 And as the Court pointed out, more importantly, right now,
22 she is taking care of her brother who is battling cancer. Does
23 transportation to and from the hospital, feeding, arranging for
24 medicine, cleaning the house, everything else. She is the only
25 person who can provide that care. And that is a continuation

1 of -- with the narrow period of her life in which she engaged
2 in this offense, that is a continuation of what she had been
3 doing before.

4 She is a hardworking single mother working to raise young
5 black men in our society. She was an employee of the sheriff's
6 department who was really appreciated because she would always
7 step up for unattractive work, overtime work whenever it was
8 needed.

9 And I know that what the Court focused on at the last
10 sentencing was, well, when she committed this offense she was a
11 jail guard, a deputy sheriff. And I certainly appreciate that
12 that makes this a different offense than one that was just a
13 small unsuccessful insurance fraud that might have been
14 committed by someone else. But I don't think that that should
15 make a material difference in what otherwise would be the
16 result of this case, in part because her offense was not
17 job-related in the sense of some of the other cases that we
18 have submitted to the Court. And she was at the lowest level
19 of the staff in the sheriff's department.

20 And that's why we brought to the Court's attention, you
21 know, the sheriff's lieutenant who assaulted a jail inmate
22 being transferred for a psychiatric exam, the job-related
23 offense -- a lieutenant, a crime of violence, sentenced to four
24 months. And we have been citing cases like that from the
25 beginning. And the government hasn't offered any offsetting

1 examples.

2 And that's because this sort of non-job-related conduct,
3 while I appreciate the Court looking at it differently because
4 of what her position was, still, it was not job-related. It
5 should not overwhelm the other strong mitigating factors.

6 And therefore, putting this all together, I believe her
7 guideline range should, at most, be four to ten months. That
8 would be the guideline range if the Court views the intended
9 loss as the 9,000 and change that would include both the items
10 found in her home and the items that the sheriff's department
11 claims as belonging to them.

12 That would put her, four to ten months. The Court could
13 sentence her under that guideline calculation, even without any
14 accommodation to where the Court could, you know -- any
15 adjustment, any departure, the Court could sentence her to home
16 detention. That would reflect the seriousness of the offense,
17 but still allow her to take care of her brother. And I think
18 that's the appropriate sentence, and I would urge that on the
19 Court.

20 **THE COURT:** Thank you.

21 Well, it's -- it's not an easy case. And I thought a good
22 deal about it. And as I started out with, I have tried to
23 glean some guidance from the Circuit's opinion in this case.

24 And I do go back -- I appreciate Ms. Vartain's arguments.
25 As always, they're very good, because she's a very fine

1 prosecutor.

2 But I do go back to where the Ninth Circuit has -- the few
3 words they said on this said I needed to focus on the intent
4 with respect to the amount of intended loss. And I do think
5 the evidence, while somewhat muddled, it does reflect here that
6 that equates to the value of the items found in her home, plus
7 those items that belonged to the sheriff's department. In
8 other words, the \$9,573.37.

9 Accordingly, I think the appropriate advisory guideline
10 calculation and the starting point would be total offense
11 level 9, Criminal History Category I, which would yield an
12 advisory guideline range of a four to ten-month custodial term.
13 Mr. Shepard is correct, this is a Zone B, and there are various
14 options under that, even were there not a further variance.

15 So applying the factors under 3553(a) that we all know
16 tells me to impose a sentence sufficient but not greater than
17 necessary -- I do continue to part company a bit with the
18 defense argument that Ms. Myres's position as a sworn law
19 enforcement officer was disconnected from her commission of the
20 crime here.

21 You know, I'll just be candid about it. I remain of the
22 view that in light of her position of public trust, the conduct
23 for which she was convicted here is shameful, and I think it
24 does become even more so because of the public trust that she
25 had undertaken.

1 At the same time, I do take into account the positive
2 record she's had while on supervised release, while this case
3 was pending on appeal. And that's what we expect of
4 defendants. So I don't think that that is, in and of itself, a
5 reason to adjust a sentence. But I take it into account.

6 And I also do take into account her role as a caregiver
7 for her brother and the -- and the positive work she does,
8 which is not simply post-conviction. She was involved in some
9 of the positive community things that she does before that, and
10 I take that into account.

11 Accordingly, I do think that the appropriate sentence at
12 this point would be a period of six months' home detention,
13 which would afford her the opportunity to take her brother to
14 his medical appointments, and to attend church services, which
15 obviously are very important to her.

16 And then, either followed by or as part of the period of
17 supervised release -- and perhaps I can ask Ms. Goldsberry.
18 With the understanding that I want to impose the six-month home
19 detention condition, is that a part of the supervised release
20 condition?

21 **MS. GOLDSBERRY:** Yes. It's a numbered condition of
22 supervised release.

23 **THE COURT:** That's what I thought.

24 **MS. GOLDSBERRY:** So she would need to receive a
25 sentence of time served. And three years supervised release.

1 Or a sentence of probation. And the home confinement would be
2 one of the conditions, in addition to the other conditions that
3 are imposed.

4 **THE COURT:** And which is -- from the Probation
5 Department's perspective, which of those two avenues would you
6 recommend? Probation? Or time served, supervised release,
7 with a condition of supervised release being six months home
8 detention?

9 **MS. GOLDSBERRY:** It looks like she did maybe one night
10 in custody. Can the defendant confirm that?

11 **THE DEFENDANT:** (Nods head)

12 **MS. GOLDSBERRY:** So she did do at least a day in
13 custody, so time served with three years supervised release
14 would work.

15 **THE COURT:** All right. Any legal reason why sentence
16 may not be imposed?

17 **MS. VERTAIN:** No, Your Honor.

18 **MR. SHEPARD:** No, Your Honor, although I -- I hesitate
19 to do this, but she's been on supervised release essentially
20 for five and a half years already.

21 Obviously, the Court -- we really appreciate the Court's
22 sentence. And the Court can impose whatever term of -- and
23 should impose whatever term of supervised release it thinks is
24 necessary. But I just wonder whether three years is -- three
25 years more is really necessary.

1 **THE COURT:** Okay. Well, I do think I'm going to
2 impose three years. I understand your argument. But I think
3 it is appropriate to have a -- to have that as a responsibility
4 on her part. And it's something I think we should do.

5 Any objection to the specific supervised release
6 conditions that the Probation Department's recommending in the
7 PSR?

8 **MR. SHEPARD:** I believe those are the same that we
9 already addressed, and so I don't have anything to add.

10 **THE COURT:** Okay.

11 **MS. VERTAIN:** No, Your Honor.

12 **THE COURT:** All right. So, pursuant to the Sentencing
13 Reform Act of 1984, it is the judgment of the Court that April
14 Myres is hereby committed to the custody of the Bureau of
15 Prisons, to be imprisoned for a term of time served. The term
16 consists of terms of time served on each of Counts 1 and 2,
17 both counts to be served concurrently.

18 Upon release from imprisonment, the defendant shall be
19 placed on supervised release for a term of three years. This
20 term consists of the terms of three years on each of Counts 1
21 and 2, all such terms to run concurrently.

22 Within 72 hours of release from the custody of the Bureau
23 of Prisons, the defendant shall report in person to the
24 Probation Office in the district to which the defendant is
25 released.

1 You still recommend that language?

2 **MS. GOLDSBERRY:** Um, well, we could take that out.
3 The --

4 **THE COURT:** Okay. So what should I take out? The
5 paragraph starting from "Upon release from custody..."?

6 **MS. GOLDSBERRY:** Yes.

7 **THE COURT:** All right, so I'm striking that.

8 **MS. GOLDSBERRY:** I'm sorry, Your Honor. We still need
9 "The term consists of three years on each of Counts 1 and 2."

10 **THE COURT:** Okay.

11 **MS. GOLDSBERRY:** You could simply say that she needs
12 to report to the Probation Office after sentencing.

13 **THE COURT:** All right. I make that adjustment.

14 While on supervised release, the defendant shall not
15 commit another federal, state or local crime; shall comply with
16 the standard conditions adopted by this Court, except for the
17 mandatory drug-testing provision is suspended; and shall comply
18 with the following additional conditions.

19 One, the defendant is -- I'm imposing a term of six months
20 home confinement. And that is to commence when?

21 **MS. GOLDSBERRY:** It will commence when they hook her
22 up.

23 **THE COURT:** Okay. So I don't need to say anything.

24 **MS. GOLDSBERRY:** You don't need to say when. And they
25 do ask that the Court does days, so it would be 180 days of

1 home confinement.

2 **THE COURT:** 180 days.

3 **MS. GOLDSBERRY:** And it's the Court's choice for home
4 confinement versus a curfew, which is a little more broad.
5 Home confinement allows that she does a schedule with the
6 probation officer, and she leaves only for work, or for
7 appointments. Where a curfew is a bulk of time. She can leave
8 at 7:00 a.m. and return at 5:00 p.m. Gives a little more
9 leeway. But it's up to the Court.

10 **THE COURT:** Okay. And that's still considered -- both
11 are under the rubric home confinement.

12 **MS. GOLDSBERRY:** Exactly. Home detention, yes.

13 **THE COURT:** Home detention.

14 **MS. GOLDSBERRY:** And home detention is a little more
15 restrictive.

16 **THE COURT:** All right.

17 **MS. GOLDSBERRY:** That she should be home most days,
18 except for pre-approved appointments.

19 **THE COURT:** All right. I'm, I'm comfortable with the
20 curfew approach.

21 **MS. GOLDSBERRY:** And the only other thing would be
22 that the technology is left up to the discretion of the
23 probation officer.

24 **THE COURT:** That's fine with me, as to whether or not
25 it's GPS or --

1 **MS. GOLDSBERRY:** Exactly.

2 **THE COURT:** All right. I'll leave it up to the
3 Probation Department on that score.

4 **MS. GOLDSBERRY:** And I'm sorry, Your Honor, the only
5 other thing is payment.

6 **THE COURT:** And payment -- and --

7 **MS. GOLDSBERRY:** Do you waive?

8 **THE COURT:** Not requiring payment. Payment is waived.

9 **MS. GOLDSBERRY:** Got it.

10 **MS. LANG:** Excuse me, Your Honor. Just one quick
11 question, I missed. Was there a certain time for the curfew?
12 Or will that be imposed by --

13 **MS. GOLDSBERRY:** That will be agreed upon between the
14 probation officer and Ms. Myres, depending on her schedule.

15 **MS. LANG:** Okay.

16 **THE COURT:** I'll give them discretion.

17 **MS. LANG:** Okay. Thank you, Your Honor.

18 **THE COURT:** Two, the defendant must pay any special
19 assessment that is imposed by this judgment and remains unpaid
20 at the commencement of the term of supervised release.

21 Three, the defendant must not open any new lines of credit
22 and/or incur new debt without the prior permission of the
23 probation officer.

24 Four, the defendant must provide the probation officer
25 with access to any financial information, including tax

1 returns, and shall authorize the probation officer to conduct
2 credit checks and obtain copies of income tax returns.

3 Five, the defendant must cooperate in the collection of
4 DNA, as directed by the probation officer.

5 It is further ordered that the defendant shall pay to the
6 United States a special assessment of \$200. Payment shall be
7 made to the Clerk of the United States District Court, 450
8 Golden Gate Avenue, Box 36060, San Francisco, California,
9 94102.

10 The Court finds the defendant does not have the ability to
11 pay a fine, and orders that the fine be waived.

12 **MR. SHEPARD:** Your Honor, if I may, one clarification?

13 **THE COURT:** Yes.

14 **MR. SHEPARD:** Ms. Myres already paid the special
15 assessment.

16 **THE COURT:** Oh, she did?

17 **MR. SHEPARD:** She --

18 **MS. GOLDSBERRY:** We still need it on the judgment,
19 Your Honor. But if the \$200 payment has been made with her
20 docket number, that's fine.

21 **THE COURT:** All right.

22 **MS. GOLDSBERRY:** It will show as satisfied.

23 **THE COURT:** Okay. And you said -- I'm leaving it to
24 the discretion of the Probation Office as to when they want to
25 begin the period, the 180-day period of home -- whatever we're

1 now calling it.

2 **MS. GOLDSBERRY:** Curfew.

3 **THE COURT:** Curfew.

4 **MS. GOLDSBERRY:** Yes. It's usually set up within
5 seven to ten days.

6 **THE COURT:** All right. Very well. And then, that
7 does afford Ms. Myres the opportunity to do the care for her
8 brother, and also attend church services.

9 **MS. GOLDSBERRY:** Yes.

10 **THE COURT:** Okay. All right.

11 With respect to appeal in this case, Ms. Myres, if you do
12 wish to file a further notice of appeal, you have 14 days from
13 the date of the entry of this judgment with which to do so. Do
14 you understand that?

15 **THE DEFENDANT:** Yes.

16 **THE COURT:** All right. Anything further in this
17 matter?

18 **MS. VERTAIN:** No, thank you, Your Honor.

19 **THE COURT:** Thank you.

20 **MR. SHEPARD:** Thank you, Your Honor.

21 **MS. LANG:** Thank you.

22 (Proceedings concluded)
23
24
25

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



/s/ Belle Ball

Belle Ball, CSR 8785, CRR, RDR

Thursday, October 27, 2022